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Supreme Court, U.S.
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No. 84-410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

O'CONNELL MACHINERY COMPANY, INC.,

Petitioner,

against

M.V. "AMERICANA", her engines, boilers, tackle, etc. and ITALIA DI NAVIGAZIONE S.p.A. (d/b/a ITALIAN LINE),

Respondents.

REPLY BRIEF OF THE PETITIONER

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O'CONNELL MACHINERY COMPANY, INC.,
Petitioner,

—against—

M.V. "AMERICANA," *et al.*,
Respondents.

On Petition for a Writ of Certiorari To
The United States Court of Appeals For
The Second Circuit

REPLY BRIEF OF THE PETITIONER

Petitioner hereby replies to the memorandum for the United States in opposition to the petition for Certiorari in this matter, received by mail on November 27th, 1984.

1. The government supports the decision below for the proposition that the Congress has the constitutional authority to change the Law of Admiralty. However, the government goes a step further and states that the Congress may limit or abolish remedies previously available in Admiralty (Gov. 5), citing *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1244-1246 (3 Cir. 1977) *cert. den.* 434 U.S. 861 (1977).*

There can be no debate that Congress can "alter, qualify or supplement" or "modify or supplement" the maritime law. Only a purist could argue in favor of maintaining the practice with

**Hurst* involved no *in rem* claim but the Court gratuitously discussed the availability of such a remedy, noting that abolishment of an *in rem* action would not alter the rules being considered. Further, the case concerned Longshoremen's rights to which the Admiralty jurisdiction would not extend until 1948, thus no Constitutional issue was present, as it is in this matter, and *Hurst* is pure dictum.

rules applicable to two hundred years ago. But the *elimination* of any class of *in rem* actions is not an alteration. It is no less than the exclusion of a thing (that is a substantive right) falling clearly within the boundaries of the maritime law—which Congress can not do. The government's arguments fail to make the distinction between the various cases concerning the expansion of the Admiralty jurisdiction with substantive rights existing under the Constitution. Modification of the jurisdiction does not insult the Constitution as long as substantive rights are preserved.

Professor Bernard Currie in his paper *Unification of the Civil Admiralty Rules: Why and How,* 17 U. of Maine L. Rev. 1, 8 (1965) regarding these remedies noted that:

> "Because the rules relating to *these remedies grow out of a body of distinctive substantive law* and out of the exigencies of maritime commerce, they should be preserved. . . . The action *in rem* gives meaning to the maritime lien and the substantive rights associated with it." (emphasis added)

In *Merchants National Bank of Mobile* v. *Dredge General G.L. Gillespie,* 663 F. 2d 1338, 1350 (5 Cir. 1981) cert. dism. 456 U.S. 985 (1982), an extensive examination of *in rem* rights was necessitated within a constitutional challenge to *in rem* arrest, wherein it was noted:

> "*A maritime lien represents a property interest entirely distinct from an in personam right.* 'An action in admiralty to enforce a maritime lien is not an action against any particular person to compel him to do or to forebear anything; it is an action *in rem* asserting against the world the claim of a plaintiff of an offending ship. *It is a real action to enforce a real right*'. E. Biele, *Maritime Liens Arising Out of Collision,* 51 Tulane L. Rev. 1134, 1134 (1977)" (emphasis added).

Similarly, The Fourth Circuit in *Amstar Corp.* v. *S/S Alexandros T.*, 664 F. 2d 904, 908-9 (4 Cir. 1981) within the same type of examination, stated:

> "Quite different from a common law lien, a maritime lien is not simply a security device to be foreclosed if the owner defaults. The vessel itself is viewed as the obligor whether or not the owner is also obligated. *Substantive maritime law confers on the holder of a maritime lien a sufficient interest in the vessel to detain it for security and ultimately to subject it to condemnation and sale for satisfaction of the lien.* The arrest of the vessel in the proceeding *in rem* is to accomplish this end. 'The lien and the proceeding *in rem* are, therefore, correlative—*where one exists, the other can be taken, and not otherwise.*'
>
> These principles were developed to meet the special needs of persons engaged in many aspects of maritime commerce. By enforcing maritime liens through the arrest of vessels in *in rem* proceedings, admiralty enables people engaged in maritime commerce to obtain redress for certain kinds of injuries caused by the vessel and its crew without seeking compensation abroad from the vessel's owner. The owner, moreover, is not exposed to unlimited liability."
>
> (emphasis added)

Contrary to the government's argument the distinction between an *in rem* remedy and an *in personam* remedy are not mere distinctions about the form in which jurisdiction is asserted. It is not the form of the remedy that we are concerned with herein, but the essence. Thus when two such remedies coexist, as they would otherwise in this case, and one of those remedies is transformed into the other, it cannot be disputed that one of the remedies has in fact been abolished. Accordingly, this court is not faced with the question of whether or not elements of the Admiralty practice can be modified but whether a remedy can be removed, thereby causing a substantive right to be lost.

This Court was confronted with a similar problem in *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 389-390 (1924) and solved the problem by holding:

> "But it is insisted that even if the statute brings those rules into that law, *it is still invalid in that it restricts the enforcement of rights founded on them to actions at law, and thereby encroaches on the admiralty jurisdiction intended by the Constitution.* It must be conceded that *the construction thus sought to be put on the statute finds support in some of its words,* and also that if it be so construed *a grave question will arise respecting its constitutional validity.* But, as this Court often has held 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'
>
> * * * *
>
> *It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,*—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible." (emphasis added)

This Court went on to permit the filing of such actions either in Admiralty or on the common-law side as an election of rights, thereby avoiding the Constitutional problem. Contrary to the governments position, *Panama R.R.* does confront the very boundaries of the Admiralty Law, and is the only case to do so.

Criticism of the FSIA for removal of substantive rights is eloquently made by Prof. A.N. Yiannopoulos in a comprehensive law review article entitled *Foreign Sovereign Immunity and the Arrest of State owned ships: The Need for an Admiralty*

Foreign Immunity Act, 57 Tulane L.R. 1274 (1983), wherein he states:

> "The FSIA, like the British Act, is a comprehensive statute that has resolved a number of important questions concerning the sovereign immunity of a foreign state. Its greatest achievement is the establishment of procedures for obtaining *in personam* jurisdiction against a foreign state and for the execution of judgments that were unavailable under the prior law. However, *many questions remain unresolved, and key terms in the FSIA remain undefined.* A court has aptly observed that the FSIA is "a vaguely-worded statute . . . *a law described by its draftsmen as providing only 'very modest guidance' on issues of preeminent importance.'* " One may sympathize.
>
> "The FSIA was primarily conceived as a vehicle for the enforcement of non-maritime claims. *The inclusion of subsection 1605 (b) and of other provisions relating to the enforcement of maritime claims appear to have been an afterthought.* Be this as it may, maritime claims that are not supported by a maritime lien may be enforced under the procedure of subsection 1605 (a), and maritime claims that are supported by a maritime lien by the procedure of either 1605 (a) or 1605 (b). *This dichotomy is unnatural and its applications may lead to incongruous results.*
>
> "The FSIA has been said to be 'of great benefit to the admiralty bar because it has established, for the first time in the United States, procedures for the enforcement of a maritime claim against a foreign state by an action *in personam*. Additionally, the FSIA is beneficial for the admiralty bar because it permits enforcement of a maritime claim that gives rise to a maritime lien by a simplified procedure without the risks inherent in an actual seizure. However, the *FSIA has, perhaps unnecessarily, deprived litigants of the in rem remedy that they had in certain circum-*

> *stances under the prior law.* This result is particularly troublesome when one thinks of the unavailability of a proceeding *in rem* for the resolution of disputes concerning the ownership or possession of a vessel or the foreclosure of a preferred ship mortgage." (emphasis added)

This, of course, is the precise point that has been put forward in this matter, that regarding certain situations, such as this case, the FSIA is not well thought out, and has the unfortunate effect of taking away rights unnecessarily. Continuing on, Prof. Yiannopoulos concludes:

> *Moreover, the provisions of the FSIA have not been coordinated with prior admiralty law, and the mere intent to preempt such law does not suffice for the resolution of problems. For example, it is uncertain whether the FSIA has abrogated any substantive law or whether it has affected the subject matter jurisdiction of federal courts in admiralty cases.* (p. 1340-42)

The point sought to be made, that the FSIA deprives maritime plaintiff of substantive rights, is not unique, but is in fact a point that deserves serious consideration, and that the Courts will have to confront sooner or later.

England avoided this problem in its State Immunity Act, 6A *Benedict on Admiralty*, p. 8-72 (7th ed. 1983), as it preserved the *in rem* action for commercial matters but created a procedure to convert *in rem* to *in personam* for matters where sovereign immunity would have otherwise applied. Thus the English procedure conforms to international practice, leaving the United States as the only major western nation which would prevent property owned by a state and used for commercial purposes from being arrested. We have thus managed to throw the baby out with the bath water, and Congress has failed in its intent to make United States law on sovereign immunity consistent with international law. See *McKeel* v. *Islamic Republic*

of Iran, 722 F.2d 582, 587 (9 Cir. 1983); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 310 (2 Cir. 1981) *cert. den.* 454 U.S. 1148 (1982); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7; (1976) U.S. Code Cong. & Ad. News 6605-6.

2. By footnote the government takes the position that unconsented suits against foreign sovereigns were not permitted in admiralty at the time of the adoption of the Constitution. (Gov. 4, n. 2). A careful examination of the state of the law prior to 1926 does not support that position. Lord Denning, the Master of the Rolls, stated the proposition powerfully in the Court of Appeal decision of *The "I Congreso Del Partido"* [1980] 1 Lloyd's L. Rep. 23, 29 (C.A. 1979):

> That doctrine about warships was wrongly extended in *The Porto Alexandre*, (1919) 1 Ll.L. Rep. 191 to state trading vessels. *But now that that case is no longer law, I am of opinion that we can go back to the law as stated by that great international lawyer Sir Robert Phillimore over 100 years ago in the Charkieh*, (1873) L.R. 4 A.&E. 59. That vessel was owned by the Khedive of Egypt. *She was used as an ordinary merchant trading vessel.* She was in collision in the Thames. Sir Robert said (at page 99):
>
> > '. . . *No principle of international law, and no decided case, and no dictum of jurists of which I am aware,* has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, so to speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; . . . (emphasis added).

Thus, *The Pesaro* 271 U.S. 562 (1926) must be recognized as a judicial orphan which created an unsupportable injustice,

circumvented by the device of the Tate Letter (26 Dept. State Bull. 984 [1952], 425 U.S. 711-716) so that the "Department of State . . . should no longer be embarrassed by having the decision in *The Pesaro* remain unquestioned . . ." [*Mexico* v. *Hoffman*, 324 U.S. 30, 40 (1945)]. Most certainly it can not provide support for the statement, as it regards state owned merchant ships that such ships have enjoyed 150 years of immunity. See *Bank of the U.S.* v. *Planter's Bank of Georgia*, 23 U.S. (9 Wheat.) 904, 908 (1824); *The Fidelity*, 8 Fed. Cas. 1189, 1191-2, No. 4758 (CC, SDNY 1879); *U.S.* v. *Wilder*, 28 Fed. Cas. 601, 604, No. 16, 694 (CC Ma, 1838); *The Charkieh*, (1873) L.R. 4 A.&E. 59. Accordingly, it must be concluded that there was a substantive right of *in rem* arrest of state-owned merchant ships under Article III when the Constitution was adopted in 1789, contrary to the court below's findings.

3. Reference is made by the government (Gov. 4) to the testimony of one Michael M. Cohen, apparently to confer the blessing of the Admiralty Bar upon the FSIA. Indeed he testified concerning the FSIA while he was Chairman of the Committee on Maritime Legislation of the Maritime Law Association of the United States (MLA), but that was as an individual, not on behalf of the MLA. Such testimony went unreported to the MLA, and the only indication given by him to the MLA concerning his involvement was that there would be a resolution for the MLA to consider. See MLA Documents 597 dated May 7, 1976, pp. 6516 and 599 dated October 29, 1976, p. 6580. No resolution *or* consideration was ever offered to the MLA, since the FSIA became law on October 21, 1976. While the circumstances of his testimony before Congress gives the appearance of MLA approval, the reality is that the MLA never actually had the opportunity to comment upon the legislation prior to its passage—an opportunity which it usually has with all maritime related legislation. The confusion that Mr. Cohen's appearance before Congress created, directly or indirectly, resulted in the adoption of a new by-law of the MLA which requires members to present only personal views unless authorized

by the MLA. See MLA Document 634, dated May 1, 1980, pp. 273-6.

4. The Government claims that the Second Circuit's decision is *S & S Machinery Co.* v. *Masinexportimport*, 706 F.2d 411, 417-18 (2 Cir. 1983) *cert. den.* 104 S.Ct. 161 (1983) disposes of the argument concerning waiver, when in fact that decision relies upon the phrase "other liability" which is not in issue in this matter, since our point concerns the term "suits against property" (which was not mentioned in that treaty, but is in this one). The government can be expected to argue for such restrictive reading of the statute, but has lost this same argument concerning its own ships. See *The Lake Monroe*, 250 U.S. 246 (1919) wherein *in rem* arrest was permitted of government owned merchant vessels since the applicable statute made them "subject to all laws, regulations and liabilities governing merchant vessels . . ." (250 U.S. at 250-1), as does the Treaty of Friendship, Commerce and Navigation with Italy, [1949] 63 Stat. 2255, T.I.A.S. #1965, 79 UNTS 171.

Conclusion

Whenever the government tells us that they are merely modifying a right under the Constitution, this Court should examine the issue with careful scrutiny, if not skepticism. The framers of the Constitution did not provide for Admiralty jurisdiction under Article III on a mere whim. The problems with Admiralty under the Colonial Vice-Admiralty Courts, and later under the State Courts during the Articles of Confederation (see *Robertson, Admiralty & Federalism,* 1970, pages 65-103) compelled the need for Constitutional boundaries of Admiralty Law, which this Court should not disturb. Accordingly, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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